NO. 04-101

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY A. BEARD, Ph.D., Secretary, Pennsylvania DOC; DAVID DiGUGLIELMO, Superintendent, SCI-Graterford; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,

Petitioners,

v.

ARNOLD HOLLOWAY,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. May a federal habeas court properly find a claim that was presented in a pro se brief exhausted, where state court practice at the time was to accept and consider such pro se briefs in capital cases, and where appellate counsel's unrebutted testimony was that the state supreme court decided at oral argument to accept and consider the pro se brief?

(Answered in the affirmative by the United States Court of Appeals for the Third Circuit)

2. May a federal habeas court applying *de novo* review grant Batson relief, where (a) the pattern of strikes and other relevant evidence established a *prima facie* case, and the Commonwealth conceded that the *prima facie* case exists; (b) the prosecutor volunteered explanations for three of his strikes but gave no reasons for the other eight; and (c) the court properly found that the reasons given for at least one of the strikes were a pretext for discriminatory intent?

(Answered in the affirmative by the United States Court of Appeals for the Third Circuit)

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COUNTERSTATEMENT OF THE CASE[1]

Five years after the murder of Richard Caldwell, heroin dealer Shirley Baker was arrested when she failed to appear for sentencing on several drug-related convictions. Baker told the police that Respondent and Danny Freeman had killed Caldwell at the instigation of Leroy Johnson. Baker testified against Freeman at his trial, but he was acquitted. Johnson was never charged.

After Freeman's acquittal, Respondent was arrested. The police claimed that Respondent confessed to them because he knew that Baker had already implicated him, despite the fact that Respondent knew Baker's testimony had been insufficient to convict Freeman. The police produced an unsigned typewritten statement, supposedly given to Detective Gilbert. Detective Gilbert claimed Respondent made the statement but then refused to sign it. Respondent denied giving a statement.

At the voir dire examination of prospective jurors, which occurred two weeks after this Court's decision in Batson v. Kentucky, 476 U.S. 79 (1986), the Commonwealth used twelve peremptory strikes, eleven of which were against African-Americans. Respondent "raised objections, created a record as to the race of the stricken venirepersons, and moved for a mistrial on the ground that a pattern of purposeful discrimination had been established." Holloway v. Horn, 355 F.3d 707, 712 (3d Cir. 2004), App. 9. In response to Respondent's objections, "the trial court invited a response from the prosecutor, asking, 'Does the Commonwealth have anything to say ...?'" App. 28 (quoting trial record). The prosecutor stated reasons for three of his strikes against African-Americans, but gave no reasons for the other eight. The trial court did not make any express ruling on the Batson challenge. Id.

At trial, there was a credibility contest between Respondent, who is African-American, and

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[1]The Petition for Writ of Certiorari is cited herein as "*Petition*." Petitioners are referred to as "the Commonwealth." The Appendix to the *Petition* is cited as "App." The parties filed an appendix in the Third Circuit, pursuant to that court's rules, which is cited herein as "A." All emphasis herein is supplied unless otherwise indicated.

Detective Gilbert, who is Caucasian, concerning the purported statement. Respondent denied making the statement, and presented an alibi defense. The trial court precluded Respondent from discussing or arguing that both he and the police officers were aware of Freeman's acquittal at the time Respondent purportedly confessed.

The jury convicted Respondent of first-degree murder and related charges. The jury sentenced him to death, concluding that the two aggravating circumstances it found outweighed the two mitigating circumstances it found. Post-trial motions, which included the Batson claim that was raised during jury selection, were denied. App. 29-30.

Respondent appealed to the Pennsylvania Supreme Court. Appellate counsel did not raise the Batson claim, but Respondent himself raised it in a pro se brief that was filed with and, the Third Circuit found, App. 15-22, accepted by the Pennsylvania Supreme Court. The Pennsylvania Supreme Court affirmed, without expressly ruling on the Batson claim. Commonwealth v. Holloway, 572 A.2d 687 (Pa. 1990) ("Holloway-1").

Respondent then filed a petition for state post-conviction relief ("PCRA petition"), again raising the Batson claim. The PCRA trial court denied relief; the Pennsylvania Supreme Court affirmed. Commonwealth v. Holloway, 739 A.2d 1039 (Pa. 1999) ("Holloway-2").

Respondent filed his first federal habeas petition. The District Court conducted a limited evidentiary hearing regarding the exhaustion/default status of the Batson claim. The District Court granted relief on Respondent's claim that counsel provided ineffective assistance at capital sentencing, but denied all guilt phase claims, including the Batson claim. Holloway v. Horn, 161 F. Supp. 2d 452 (E.D. Pa. 2001), App. 46.

A unanimous panel of the Third Circuit reversed, granting relief on the Batson claim. In reaching its ruling, the Third Circuit carefully reviewed a large number of issues relating to the exhaustion status of the claim; whether the claim was procedurally barred in any respect; on the

standard of review; and with respect to the merits of the claim.

On **exhaustion**, the Third Circuit ruled that the Batson claim was exhausted both on direct appeal and in state post-conviction ("PCRA") proceedings. App. 14-22 & n.5. The Batson challenge was raised during voir dire, App. 9, and in a post-verdict motion for a new trial, App. 29-30. Appellate counsel did not raise the Batson issue, but Respondent raised it by filing an application for permission to file a pro se appellate brief, together with a brief that raised the issue. The Pennsylvania Supreme Court deferred consideration of Respondent's request until oral argument. App. 15-16. At the District Court evidentiary hearing, appellate counsel's unrebutted testimony was that the Pennsylvania Supreme Court accepted the pro se claims at oral argument, including the Batson claim. App. 16-17.

Based on appellate counsel's testimony, as well as the "Pennsylvania Supreme Court's practice, at the time of Holloway's appeal, of considering issues raised pro se even if counseled briefs were filed," App. 18, the Third Circuit found that the Pennsylvania Supreme Court "assented to consideration of the pro se supplemental claims, including the Batson issue." App. 20. The Third Circuit further found that the Batson claim was raised and exhausted again in the PCRA proceedings, App. 22 n.5, and that Respondent's "decision to reassert the Batson claim on PCRA review does nothing to diminish his exhaustion of the claim on direct appeal." App. 21.

The Third Circuit further found that there was **no procedural default** of the Batson claim. The Commonwealth **does not seek *certiorari*** on the Third Circuit's conclusion that the Batson claim is not subject to any procedural default.

In the PCRA proceedings, the Pennsylvania Supreme Court ruled that the Batson claim was defaulted because it had not been raised in the PCRA trial court. Holloway-2, 739 A.2d at 1043-44. It proceeded to review the claim solely as a claim that PCRA counsel was ineffective for failing to raise the issue. Id. In fact, however, Respondent did raise the claim in the PCRA trial court, so there

was no default on that basis. App. 13; see also App. 108 n.30 ("An examination of the record, ... shows that the Batson claim was raised to the PCRA trial court").

The District Court ruled that Respondent defaulted the Batson claim because appellate counsel did not raise it on direct appeal. App. 107-08. As the Third Circuit found, however, the Pennsylvania Supreme Court "never expressly or otherwise held the [Batson] claim defaulted for that reason," App. 13, and therefore there was no bar to merits review of the claim. App. 13-14.

With respect to the **standard of review**, the Third Circuit ruled that its review of the Batson claim was *de novo*. The Commonwealth **does not seek *certiorari*** on the Third Circuit's decision to review the Batson claim *de novo*.

In order for the deferential standard of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") to apply, the claim at issue must have been "adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). The Third Circuit found that, while Respondent presented the Batson claim to the Pennsylvania Supreme Court on direct appeal, that court "failed even to mention the claim (much less adjudicate the merits)"; thus, the pre-AEDPA *de novo* standard governed its review. App. 23. The Third Circuit further found that, on the PCRA appeal, the "Pennsylvania Supreme Court treated Holloway's Batson argument ... solely as a claim of ineffective assistance of counsel ...." Id. Because the state court did not address the underlying Batson claim, it did not "adjudicate[] the merits" of that claim in the PCRA proceedings. App. 23-24.

With respect to the **merits of the claim**, the Third Circuit had "little difficulty in concluding" that Respondent established a *prima facie* showing of discrimination. App. 30. The Third Circuit reached that conclusion based on the prosecutor's pattern of strikes – the prosecutor used seven of his first eight strikes, and eleven out of twelve in all, against African-Americans – and the fact that peremptory challenges permit those to discriminate who are of a mind to do so, see Batson, 476 U.S. at 96, which was particularly significant given that the trial involved a credibility contest between

an African-American defendant and a white police officer. App. 30-32.[2] The trial record regarding the prosecutor's pattern of strikes was so convincing that at oral argument in the Third Circuit, the **Commonwealth conceded** that the pattern of strikes establishes a *prima facie* case. Holloway v. Horn, Nos. 01-9009 & 01-9010, Transcript of Oral Argument at 48, 52 (3d Cir. Oct. 27, 2003).[3]

The prosecutor gave no reasons at all for eight of his strikes against African-Americans, despite being given the opportunity to do so by the trial court. The prosecutor stated on the record at trial reasons for three of his strikes. The Third Circuit was "troubled by the lack of race-neutrality" in those explanations, each of which explicitly referenced the potential juror's race, and "more troubled by the lack of any explanation at all for eight of his eleven strikes." App. 34. The court, however, assumed that the explanations proffered for three of the strikes would satisfy the second prong of Batson. It granted relief because the explanation given for striking venireperson John Hackley, Sr., "was plainly insupportable under Batson ...." Id.

The prosecutor's explanation for striking Mr. Hackley was that he was a "black male juror approximately the same age as the defendant." Given that the prosecutor accepted three white jurors of "approximately the same age as" Respondent, and chose not to exercise a strike against four other venirepersons of approximately the same age, the Third Circuit found that the reason given was a pretext for "discriminatory intent to remove Hackley because of his race." App. 34-35.

The Third Circuit rejected the Commonwealth's argument that it should consider other possible reasons not stated by the prosecutor at trial, because "where a prosecutor makes his

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[2]The court also noted that for those strikes for which the prosecutor volunteered explanations (including John Hackley, Sr., the potential juror with respect to whom the court found discrimination), the existence of a *prima facie* showing is moot. App. 33, citing Hernandez v. New York, 500 U.S. 352, 359 (1991) (plurality opinion).

[3]Because the pattern of strikes was so convincing, the Third Circuit did not need to consider other evidence, developed during the federal habeas proceedings, concerning the race of the other venirepersons the prosecutor had an opportunity to strike. Had the court considered that evidence, however, it would have further supported the *prima facie* showing. App. 32 n.11.

explanation for a strike a matter of record, our review is focused solely upon the reasons given." App. 35-36. The court noted, however, that the record of Mr. Hackley's voir dire examination did not disclose any apparent non-discriminatory basis for the prosecutor's strike. App. 36.

Finally, the Third Circuit found that the Pennsylvania Supreme Court's decision on PCRA review did not bar relief on Respondent's Batson claim. On the PCRA appeal, the Pennsylvania Supreme Court stated that it could not even consider a claim that PCRA counsel was ineffective in failing to raise the Batson claim because Respondent had "failed to make a record 'identifying the race of venirepersons stricken by the Commonwealth, the race of prospective jurors acceptable to the defense but stricken by the defense, and the racial composition of the final jury selected.'" Holloway-2, 739 A.2d at 1045, quoting Commonwealth v. Bronshtein, 691 A.2d 907, 915 (Pa. 1997).

The Third Circuit found that this "standard for assessing whether a defendant can make a *prima facie* showing of purposeful discrimination," App. 38, is "inconsistent with the teachings of Batson." App. 37. Under Batson, the "standard for assessing a *prima facie* showing is fluid." App. 41. While a full accounting of venireperson race "undoubtedly might ... be helpful" in some cases, "requiring the presentation of such a record" in every case "places an undue burden upon the defendant." App. 42. Here, the record was in fact sufficient to establish both a *prima facie* case of discrimination, as the Commonwealth conceded, and that the prosecutor's explanation for at least one of his strikes was pretextual. App. 44. Accordingly, applying *de novo* review, the Third Circuit found an equal protection violation.[4]

The Commonwealth requested rehearing *en banc*, raising substantially the same arguments as those presented in the *certiorari* petition. The Third Circuit denied rehearing *en banc*. App. 1-2.

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[4]Alternatively, the court would also have granted relief under AEDPA. App. 44-45.

REASONS FOR DENYING THE WRIT

I. INTRODUCTION

The Commonwealth asks this Court to grant its sparingly used *certiorari* review to address an exhaustion issue – whether Respondent's Batson claim was exhausted by his raising it in a supplemental *pro se* brief that he filed on direct appeal – and issues concerning the details of how that Batson claim was reviewed *de novo* by the Third Circuit. The Commonwealth's *certiorari* petition, however, fails to acknowledge the limited and alternative nature of the rulings it asks this Court to review.

The Third Circuit found: (1) Respondent's claim was exhausted both on direct appeal and in state post-conviction proceedings (the latter ruling is not challenged by the Commonwealth); (2) there was no adequate and independent bar to federal review (a ruling not challenged by the Commonwealth); (3) the claim should be reviewed *de novo* because it was not adjudicated on the merits by the state court (a ruling not challenged by the Commonwealth); and (4) applying *de novo* review, Respondent is entitled to relief on his Batson claim (a ruling that is not ultimately affected by the correctness *vel non* of the Third Circuit's discussion of errors it believed were committed by the state court). Because the Third Circuit ruled on several alternative grounds that are not challenged by the Commonwealth, review of the issues raised by the Commonwealth would not affect the Third Circuit's grant of relief. For that reason alone, *certiorari* review is not appropriate.

Moreover, the Commonwealth grievously distorts the actual rulings it asks this Court to review. The Third Circuit carefully parsed the procedurally, factually and legally complicated record of the Batson claim. It assessed numerous subsidiary issues of state law and procedure, and arrived at rulings that are clear, consistent with prior precedents (the Commonwealth does not assert the existence of any conflict in precedent as a basis for *certiorari* review) and correct. The Commonwealth attempts to obscure these facts both by distorting the holding and reasoning actually

applied by the Third Circuit, and by making a broadside attack on the entire Third Circuit – which denied *en banc* review of the issues raised here by the Commonwealth – and the panel below as a biased group of anti-death penalty zealots who, in capital cases, abandon their oaths to decide cases impartially. See *Petition* at 17-18 n.7. The Commonwealth's vitriol and hyperbole are misplaced and offensive; the Third Circuit's actual decision is balanced, fair and correct.

II. THIS COURT SHOULD NOT REVIEW THE THIRD CIRCUIT'S ALTERNATIVE AND CORRECT HOLDING THAT THE BATSON CLAIM WAS EXHAUSTED ON DIRECT APPEAL.

A. The Third Circuit's Exhaustion-on-Direct-Appeal Ruling Was an Alternative Holding That this Court Should not Review.

The Third Circuit ruled that Respondent "satisfied the exhaustion requirement on direct appeal." App. 14. The Third Circuit alternatively found that Respondent "also exhausted the Batson claim on PCRA review." App. 22 n.5. Furthermore, the Third Circuit found that there was no adequate and independent state court bar, arising either on direct appeal or in the PCRA proceedings, to federal habeas review. App. 13-14. Finally, the Third Circuit found that the state courts did not adjudicate the merits of the Batson claim, either on direct appeal or in the PCRA proceedings, and therefore that its review was *de novo*. App. 23-24.

Of those four rulings, the Commonwealth challenges only the first. Even were this Court to grant review and reverse the Third Circuit's first ruling, however (which it should not do for the reasons set forth in part B, infra), that would not affect the Third Circuit's other holdings that the claim was exhausted in the PCRA proceedings, and is not subject to any procedural bar. Thus, review and even reversal of the exhaustion-on-direct-appeal ruling would not affect the outcome of the case. Accordingly, it is not an appropriate issue for *certiorari* review.[5]

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[5]The Commonwealth says in a footnote that the exhaustion-on-direct-appeal ruling was critical "because if the Batson claim was *not* exhausted on direct appeal, the most Holloway could logically be entitled to is review of his *ineffectiveness* claim." *Petition* at 22 n.9 (emphasis original).

B. The Third Circuit's Finding That the Batson Claim Was Exhausted on Direct Appeal Raises No Important Federal Question.

The Third Circuit correctly found that this claim was exhausted on direct appeal, and not subject to any adequate procedural bar by the state court, when Respondent presented it to the Pennsylvania Supreme Court in his pro se brief. App. 14-22.[6] The Third Circuit's exhaustion finding was based on several considerations, none of which is undermined by the Commonwealth.

First, the Third Circuit held that its exhaustion-on-direct-appeal finding was compelled by the state court record and the record made in the District Court, which held an evidentiary hearing on the exhaustion/default status of the Batson claim.[7]

The Pennsylvania Supreme Court's docket shows that Respondent filed his pro se brief, containing the Batson claim, along with an application for permission to file it as a supplement to the counseled brief. App. 15. The Pennsylvania Supreme Court's docket also shows that, at the time of the filing, the "Pennsylvania Supreme Court entered an order deferring consideration of Holloway's application to file the pro se supplemental brief until the time of oral argument on the

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But that would only be true if the Batson claim that was presented in the PCRA proceedings was subject to an adequate and independent procedural bar, so that Respondent was required to raise an ineffectiveness claim to overcome the bar. The Third Circuit, however, ruled that there was no adequate and independent bar, and that the Pennsylvania Supreme Court never adjudicated the merits of the underlying Batson claim, either on direct appeal or post-conviction – rulings that the Commonwealth has not challenged. Accordingly, even a reversal of the exhaustion-on-direct-appeal ruling would not affect the Third Circuit's conclusions that the claim was exhausted, was not barred, and was subject to *de novo* review.

[6]The Commonwealth does not dispute that the content of the pro se brief was sufficient to exhaust the claim; it plainly was, as the Third Circuit found. App. 14-15. The Commonwealth's sole argument is that presentation of a claim in a pro se brief was insufficient to exhaust.

[7]The District Court hearing was limited to questions of exhaustion/default; it did not address the merits of the underlying Batson claim. Therefore, 28 U.S.C. "§ 2254(e)(2) is inapplicable to [the] hearing" and "the evidence adduced at the hearing is properly considered for purposes of the exhaustion analysis." App. 18. The Commonwealth does not seek *certiorari* regarding the propriety of the hearing.

appeal." App. 15-16. The docket, however, is silent as to the Pennsylvania Supreme Court's ultimate disposition of Respondent's pro se motion and claims. App. 16.

The District Court "held a limited evidentiary hearing" on the exhaustion/default status of the Batson claim. App. 16. The sole witness at the hearing was direct appeal counsel, Robert Redmond. Mr. Redmond testified that, during the direct appeal oral argument, the Pennsylvania Supreme Court explicitly ruled that it would consider the issues raised in the pro se brief – i.e., it orally granted Respondent's pro se motion to allow that brief as a supplement to the counseled brief. App. 16-17.[8] Mr. Redmond's testimony was unrebutted: "The Commonwealth ... presented no evidence at the federal hearing to rebut or cast any doubt upon [Redmond's] recollection that the state court accepted the pro se supplemental brief for consideration." App. 17.[9]

Based on this unrebutted evidence, the Third Circuit concluded: "On this record, Holloway has met his burden of showing that he exhausted the Batson claim on direct appeal, as he placed the state court on notice of the factual and legal substance of his federal equal protection argument and raised the claim through the established system for review." App. 17.

Second, the Third Circuit explained that its "conclusion that Holloway exhausted the Batson

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[8]Mr. Redmond's unrebutted testimony included the following: A625-26 (At oral argument, "the [Pennsylvania Supreme] Court said it would consider all the matters contained in the pleadings set forth and the Batson issue was one of them."); A626 (pro se brief "was part of the docket entries that had been ... duly filed and timely filed and it was set forth and it was for a part of the Court's consideration. And the Court even noted the fact that it would consider that Batson issue or at least his pro se brief."); A642 (Pennsylvania Supreme "Court had duly noted that it had received the pro se brief, was taking it under advisement, taking all the matters raised under advisement after oral argument. So I thought that the Court had taken note of it."); A642 "Q. ... So there had been the raising of the issue in the pro se filing ... and then at oral argument your recollection is that the Court said it would take all issues under advisement ...? A. Yes.").

[9]As the Commonwealth notes, oral arguments before the Pennsylvania Supreme Court are not transcribed. *Petition* at 25. Thus, evidence about what occurred at the argument could come only from a participant, such as Mr. Redmond. The Commonwealth was free to call anyone from the District Attorney's Office who participated in the oral argument, but did not call anyone or present or proffer any evidence contrary to Mr. Redmond's testimony.

claim by means of his pro se brief is fully supported by the Pennsylvania Supreme Court's [capital case] practice, at the time of Holloway's [direct] appeal, of considering issues raised pro se even if counseled briefs were filed." App. 18. The Third Circuit is correct. As the Third Circuit found, App. 18-20, the Pennsylvania Supreme Court's practice of accepting pro se briefs from counseled appellants in capital cases is shown by Pennsylvania Supreme Court decisions from the relevant time, which repeatedly note that the Court had accepted such briefs and which never decline to accept them.[10] The Pennsylvania Supreme Court did not change this practice until 1994, four years after Respondent's direct appeal. App. 19-20 (discussing Commonwealth v. Ellis, 626 A.2d 1137 (Pa. 1993) (non-capital case); Commonwealth v. Reid, 642 A.2d 453 (Pa. 1994) (the first capital decision that declined to accept pro se claims)). The Pennsylvania Supreme Court's pre-1994 practice of accepting pro se briefs in capital cases was also confirmed at the District Court hearing, where direct appeal counsel testified, without contradiction or rebuttal, that this was the Pennsylvania Supreme Court's practice at the time of Respondent's direct appeal.[11]

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[10]Commonwealth v. Maxwell, 477 A.2d 1309, 1312 & n.2 (Pa. 1984) (addressing on merits claims raised by appellant in "pro se letters addressed to this Court"); Commonwealth v. Maxwell, 626 A.2d 499, 501 (Pa. 1993) (same); Commonwealth v. Billa, 555 A.2d 835, 842 (Pa. 1989) (addressing claims raised in a "Pro Se Supplemental Brief," filed after oral argument, under Rule of Appellate Procedure 2501(a)); Commonwealth v. Tedford, 567 A.2d 610, 626 (Pa. 1989) (reviewing all claims raised in both pro se and counseled briefs); Commonwealth v. Tilley, 595 A.2d 575, 579 & n.9 (Pa. 1991) (same); Commonwealth v. Ly, 599 A.2d 613, 617-18 (Pa. 1991) (same); Commonwealth v. Chambers, 599 A.2d 630, 633, 642 n.7 (Pa. 1991) (same); Commonwealth v. Jones, 610 A.2d 931, 948 n.3 (1992) (same); Commonwealth v. Zook, 615 A.2d 1, 22 (Pa. 1992) (same); Commonwealth v. Williams, 615 A.2d 716, 720 & n.6 (Pa. 1992) (same). Two of these opinions, Billa and Zook, note that the pro se brief was filed after oral argument.

[11]E.g., A610 ("at the time of this appeal, Pennsylvania law permitted a petitioner to make a pro se submission of issues to the Pennsylvania Supreme Court"); A611 ("at the time ... a capital defendant could submit issues pro se to the Pennsylvania Supreme Court and ... the Pennsylvania Supreme Court would rule on them"); A627 ("at the time the Pennsylvania Supreme Court considered pro se briefs by ... capital defendants"); A624 (the pro se brief was a "legitimate" way of putting the Batson claim "before the [Pennsylvania Supreme] Court and [Respondent] had done a fine job of raising it"); A625 (Batson issue "was preserved throughout" trial and direct appeal

Given direct appeal counsel's unrebutted testimony that the Pennsylvania Supreme Court did accept the pro se brief; given the pre-1994 caselaw showing that it was the Pennsylvania Supreme Court's "practice at the time" to accept such pro se briefs; and given appellate counsel's unrebutted testimony confirming that this was the Pennsylvania Supreme Court's practice at the time, the Third Circuit "simply ha[d] no reason to believe that the [Pennsylvania Supreme] Court refused" to accept the pro se brief in this case. App. 20.

Finally, the Third Circuit noted that its exhaustion-on-direct-appeal holding is consistent with Third Circuit precedent, Buehl v. Vaughn, 166 F.3d 163, 176 n.8 (3d Cir. 1999), which had also held, in a Pennsylvania capital case, that a "counseled petitioner exhausted claims by presenting them in a pro se brief to the Pennsylvania Supreme Court." App. 17.[12] For all of these reasons, the Batson claim was exhausted on direct appeal.

The Commonwealth misstates the Third Circuit's exhaustion holding, claiming the Third Circuit "held that the Pennsylvania Supreme Court was *obligated* to accept" the pro se brief. *Petition* at 25 (emphasis original). But the Third Circuit never even suggested that the Pennsylvania Supreme Court was "obligated to accept" the pro se brief. Instead, the Third Circuit found, based

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proceedings by trial counsel's actions at trial and in post-trial motions and by Respondent's pro se filings on appeal); A627 (Batson "issue was before the [Pennsylvania] Supreme Court" through the pro se filing); A631 (Respondent "himself had raised the issue [in the pro se brief] ... so it was preserved on the record as far as I was concerned. Whether I raised it or not, it was preserved by the appellant himself."); A638 (because of the pro se brief, "the issue was there [before the Pennsylvania Supreme Court] and I felt that [Respondent] was in better command of the knowledge of what was going on in jury selection than I was"); A639 ("this [Batson] issue that was raised, I felt that it had merit, especially coming from [Respondent] because [Respondent] was there at the trial and he knew much better than I knew what had taken place at the trial"); A644 ("The [Batson] issue was preserved on post-trial motions and at trial it was preserved and it was preserved on appellate review by [Respondent] himself" through the pro se submission); A648 (pro se presentation was "sufficiently raising it to the Pennsylvania Supreme Court").

[12] As here, the Pennsylvania Supreme Court's Buehl opinions do not mention the pro se brief or these pro se issues. See Commonwealth v. Buehl, 508 A.2d 1167 (Pa. 1986); Commonwealth v. Buehl, 658 A.2d 771 (Pa. 1995).

on the unrebutted evidence, that the Pennsylvania Supreme Court did accept the pro se brief, and that its acceptance of the pro se brief was consistent with its pre-1994 capital case precedent, under which it repeatedly accepted such pro se briefs and never said such pro se briefs would not be accepted.

The Commonwealth also distorts the content of direct appeal counsel's testimony, claiming he testified only that the Pennsylvania Supreme Court "received" the pro se brief, but did not testify that the Court "accepted" it. *Petition* at 24, 28-29. Assuming for the sake of argument a material difference between "receiving" and "accepting," the Commonwealth's argument is contrary to the record and contrary to the Third Circuit's factual findings, based on that record, that the state court accepted the brief and agreed to consider the claims therein. See supra. The Commonwealth's argument, which asks this Court to second guess the Third Circuit on a factual issue, highlights how inappropriate it would be to grant *certiorari*. See Supreme Court Rule 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings").

Apparently recognizing that direct appeal counsel's actual testimony is fatal to its argument, the Commonwealth asks this Court to disbelieve that testimony. *Petition* at 22-23, 29 n.11. Again, this desperate argument shows that *certiorari* review is inappropriate. See Supreme Court Rule 10. Moreover, there actually is no reason to disbelieve appellate counsel's testimony.

The Commonwealth says direct appeal counsel should be disbelieved because the state court docket "mentions no 'acceptance' of the pro se brief." *Petition* at 29 n.11. This is absurd. The state court docket does not say one way or the other whether the pro se brief was "accepted" – it is silent on that issue. The only evidence on that issue is appellate counsel's unrebutted testimony that the court did accept the brief at the oral argument. The Commonwealth says appellate counsel should be disbelieved about the state court's acceptance of the brief because other parts of his testimony supposedly were "false." *Petition* at 29 n.11. While such a credibility argument is unworthy of *certiorari* in any event, the Commonwealth's assertions are baseless.

The Commonwealth says counsel testified "false[ly]" when he said the pro se brief was "timely." *Petition* at 29 n.11. But it was timely – Rules of Appellate Procedure 123 and 2501, under which it was filed, do not contain time limits. The Commonwealth says counsel "testified that he *relied* on the contents of [the pro se] brief while writing his own" brief; according to the Commonwealth this is "false" because the pro se brief was filed after the counseled brief. *Petition* at 29 n.11 (emphasis original). But counsel's testimony was that he discussed the Batson issue with Respondent before he drafted the counseled brief; he therefore knew before he drafted the counseled brief that Respondent intended to raise the issue pro se; and he believed that the pro se brief properly raised it. A622-24. The Commonwealth says counsel "did not mention the pro se brief" when he spoke to the prosecutor several days before the District Court hearing and "conceded that he had not remembered the pro se brief until Holloway's current counsel brought it to his attention." *Petition* at 29 n.11. But this is entirely unremarkable and suggests honesty, not fabrication. Counsel testified that the prosecutor had not shown him any documents from the original proceedings (e.g., docket sheets, pro se brief, counseled brief, post-verdict motions, jury selection transcripts, etc.). A643. It is not surprising that counsel did not recall the details of what happened until after his memory was refreshed by examination of the documents.

The Commonwealth disagrees with the Third Circuit's finding that it was the Pennsylvania Supreme Court's pre-1994 practice to accept pro se briefs from counseled appellants in capital cases. See *Petition* at 22-23, 25-26. This argument over the details of state law and practice is not worthy of *certiorari*. Rather, this Court routinely defers to Court of Appeals decisions about such matters.[13]

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[13]See, e.g., Lambrix v. Singletary, 520 U.S. 518, 525 (1997) (declining to address exhaustion/procedural bar issue because, "as we have repeatedly recognized, the courts of appeals are more familiar than we with the procedural practices of the States in which they regularly sit"); Cranberry v. Greer, 481 U.S. 129, 136 n. 9 (1987) ("Petitioner has also contested the Court of Appeals' determination that he failed to exhaust his state remedies. ... On that issue, however, we defer to the Court of Appeals which is more familiar with Illinois' practice than we are."); Rummel v. Estelle, 445 U.S. 263, 267, n.7 (1980) (rejecting procedural default argument on the basis of

Moreover, the Commonwealth is plainly wrong. The Third Circuit cited numerous pre-1994 capital cases in which the Pennsylvania Supreme Court did accept such pro se briefs, App. 18-20; see n. 10, supra; the Commonwealth has never identified even one pre-1994 capital case where the Pennsylvania Supreme Court declined to accept such pro se briefs. Instead, the Commonwealth relies on non-capital cases from Pennsylvania's Superior Court which, as the Third Circuit found, do not reflect the Pennsylvania Supreme Court's capital case practice. See App. 19-20 (discussing the Commonwealth's Superior Court caselaw).[14]

The Commonwealth says the Third Circuit's exhaustion holding is inconsistent with another Third Circuit decision, Sweger v. Chesney, 294 F.3d 506 (3d Cir. 2002), which supposedly "held that claims raised by [counseled] criminal defendants are *not exhausted* by inclusion in pro se appellate briefs." *Petition* at 23 (emphasis original). Even if this were true, such an intra-Circuit conflict is not grounds for granting *certiorari*.[15] Tellingly, the Commonwealth does not even suggest an inter-Circuit conflict. In fact, the other Circuits are in accord with the Third Circuit – while this issue rarely arises, in the few cases in which it has, the Courts of Appeal have found the pro se

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deference to the Court of Appeals' interpretation of Texas contemporaneous-objection law); County Court of Ulster Cty. v. Allen, 442 U.S. 140, 153-54 (1979) (declining to find procedural bar where "three Second Circuit Judges, whose experience with New York practice is entitled to respect, concluded that the State's highest court had decided the issue on its merits"); Butner v. United States, 440 U.S. 48, 57-58 (1979) (lower courts better suited to decide questions of state law).

[14]The Commonwealth cites one Pennsylvania Supreme Court case that pre-dates Respondent's direct appeal, Commonwealth v. Colson, 490 A.2d 811 (Pa. 1985). See *Petition* at 23. Colson, however, is a non-capital case holding there is no constitutional right to act as co-counsel at trial. Colson says nothing about whether the Pennsylvania Supreme Court would accept pro se appellate briefs; the Court routinely accepted them in capital cases.

[15]An intra-Circuit split would be grounds for *en banc* Circuit rehearing. The Commonwealth sought *en banc* rehearing because the panel decision supposedly "is in tension with Sweger." *Petition for Rehearing En Banc* at 12. The *en banc* Circuit was unimpressed and denied rehearing.

claims to be exhausted.[16]

Moreover, there is no conflict even within the Third Circuit. Sweger is consistent with the Third Circuit's ruling here (and its earlier decision in Buehl, supra, which also found pro se claims exhausted). The Commonwealth's description of Sweger – that it supposedly held pro se claims unexhausted – is not what Sweger actually held. Instead, Sweger actually held that the pro se claim was "exhausted but procedurally defaulted because the [state courts] ... dismissed it on procedural grounds." Id., 294 F.3d at 522. Thus, Sweger, like the panel here, held that claims were exhausted in a pro se brief.[17] There is no inconsistency even within the Third Circuit.

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[16]See, e.g., Clemmons v. Delo, 124 F.3d 944, 947-49, 954 (8th Cir. 1997) (claims exhausted where counseled appellant presented them to state supreme court in a pro se "motion ... for leave to file a supplemental brief pro se" and state supreme court "denied the pro se motion without comment"); Dorsey v. Kelly, 112 F.3d 50, 52 (2d Cir. 1997) ("A petitioner may satisfy the exhaustion requirement by presenting his federal claim in a pro se supplemental brief, even if he has an attorney"; finding such claims exhausted); Reid v. Senkowski, 961 F.2d 374, 376 (2d Cir. 1992) (same); Abdurrahman v. Henderson, 897 F.2d 71, 72-74 (2d Cir. 1990) (same); Atkins v. Moore, 139 F.3d 887, 1998 WL 93409, *4 n.6 (4th Cir. March 5, 1998) (unpublished, text on Westlaw) (same); Grizzell v. Compton, 918 F.2d 178, 1990 WL 177374, *1 (6th Cir. Nov. 13, 1990) (unpublished, text on Westlaw) (claims exhausted where counseled appellant "submitted a supplemental pro se brief addressing additional issues" to the state court, and state court "never considered the issues presented in the [pro se] supplemental brief"); Southers v. Morgan, 925 F.2d 1465, 1991 WL 21972, *1-*2 (6th Cir. Feb. 21, 1991) (unpublished, text on Westlaw) (claims exhausted where counseled appellant presented them to state court in a "supplemental pro se brief" and state court granted state's motion "to strike [the] pro se pleadings").

[17]The Third Circuit found that there is no procedural bar here, App. 12-14, and the Commonwealth **does not seek *certiorari*** on that ruling. Moreover, the Third Circuit's ruling is correct, for several reasons. First, the Holloway state court did not deny the pro se brief on procedural grounds; instead, direct appeal counsel's unrebutted testimony is that the state court accepted the brief. Second, even if direct appeal counsel's testimony is ignored, what is left is a silent record that does not state a denial on any grounds, let alone on procedural grounds. Under these circumstances, it is impossible to say that the state court "actually ... relied on the [supposed] procedural bar" as an "independent basis for [its] decision," and there is no bar against federal merits review. Harris v. Reed, 489 U.S. 255, 261-62 (1989). Third, even if it is assumed, contrary to the record, that the state court actually denied the Batson claim on procedural grounds (because it was raised pro se), such a denial would not be an adequate state ground because there was no "firmly established and regularly followed state practice" of barring such pro se claims; instead, the practice

Finally, the Commonwealth repeatedly emphasizes that the Pennsylvania Supreme Court did not mention the Batson claim in its direct appeal opinion. But that is quite irrelevant to the exhaustion issue. As the Third Circuit explained:

> It is "too obvious to merit extended discussion that whether the exhaustion requirement ... has been satisfied cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court." Smith v. Digmon, 434 U.S. 332, 333 (1978) (per curiam) ....

App. 21.[18]

The Third Circuit's exhaustion-on-direct-appeal finding is an alternative ruling and is clearly correct. Moreover, the Commonwealth has utterly failed to show that it involves an important question of federal law. This Court should not grant *certiorari* to review such a trivial matter.

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at the time, see note 10, supra, was to allow such pro se claims. See Ford v. Georgia, 498 U.S. 411, 423-24 (1991) (later-adopted state procedural bar not adequate); see also Clemmons, 124 F.3d at 948 & n.3, 954 (no adequate bar to claims raised in pro se brief, though state court denied motion for leave to file brief; because state court sometimes allowed pro se briefs, there was no "regularly applied rule of state procedural law" barring them).

[18] Accord Buehl, supra (claims exhausted where petitioner presented them in pro se brief and Pennsylvania Supreme Court denied relief without mentioning pro se brief or claims); Clemmons, 124 F.3d at 948 & n.3, 954 (claims exhausted where petitioner presented them to state court in pro se supplemental brief, which the state court denied leave to file); Atkins, 1998 WL 93409 at *4 n.6 (claims exhausted where petitioner presented them to state court in pro se supplemental petition and state court "did not rule explicitly on the supplemental petition"); Grizzell, 1990 WL 177374 at *1 (same); Southers, 1991 WL 21972 at *1-*2 (claims exhausted where presented in "supplemental pro se brief" and state court granted state's motion "to strike [the] pro se pleadings").

III. THIS COURT SHOULD NOT GRANT *CERTIORARI* TO REVIEW LOWER COURT *DICTA*; THE THIRD CIRCUIT CORRECTLY APPLIED BATSON IN ITS *DE NOVO* REVIEW OF RESPONDENT'S CLAIM.

A. This Court Should not Grant *Certiorari* to Review the Third Circuit's Discussion, in *Dicta*, of the State Court's Ruling.

The Third Circuit reviewed the Batson claim *de novo* because it was not "adjudicated on the merits," § 2254(d), in the state court. See Counterstatement of the Case. The Commonwealth does not seek *certiorari* on the Third Circuit's ruling that the claim was subject to *de novo* review.

Applying *de novo* review, the Third Circuit found that Respondent established a *prima facie* case of discrimination; ruled in the alternative that no *prima facie* showing was needed with respect to prospective jurors for whom the prosecutor volunteered reasons for his strikes; assumed that the prosecutor had proffered facially race-neutral explanations for three of his strikes of African-Americans; found that the proffered explanation for the strike of John Hackley, Sr., was a pretext for a "discriminatory intent to remove Hackley because of his race"; and granted relief. App. 35.

After granting relief on the Batson claim, the Third Circuit discussed the Pennsylvania Supreme Court's ruling in Holloway-2 on a claim that prior counsel was ineffective for failing to raise the Batson issue. App. 37-44. The Commonwealth urges this Court to grant *certiorari* and review the correctness of that discussion. *Petition* at 7-22.

The correctness of the Third Circuit's discussion of Holloway-2, however, is not essential to its judgment. Given that the Third Circuit was applying *de novo* review, in discussing the state court ruling it was simply heeding this Court's admonishment that federal habeas courts applying such review "should, of course, give great weight to the considered conclusions of a coequal state judiciary." Miller v. Fenton, 474 U.S. 104, 112 (1985). Just as plainly, however, that discussion was *dicta* – once the Third Circuit had decided that the prosecutor had stricken prospective juror Hackley because of his race, the correctness *vel non* of the state court ruling was not controlling. See id. (the "ultimate question [of constitutionality] is a matter for independent federal determination").

The Third Circuit's discussion of Holloway-2 is *dicta* for another reason as well. While the Third Circuit found a *prima facie* case, App. 32-33, it also ruled that the *prima facie* showing is not necessary "when the prosecutor provides explanations for his strikes despite the absence of a request from the trial court," App. 33, citing Johnson v. Love, 40 F.3d 658, 663-65 (3d Cir. 1994); Hernandez v. New York, 500 U.S. 352, 359 (1991) (plurality opinion), a ruling the Commonwealth does not challenge. The prosecutor volunteered reasons for striking Mr. Hackley; the Third Circuit found those reasons to be pretextual; and the Third Circuit granted relief on that basis. App. 34-36. Thus, nothing the Third Circuit said about Holloway-2, which concerned only the *prima facie* case, affects the Third Circuit's decision to grant relief.

The Commonwealth urges this Court to review the Third Circuit's finding of a *prima facie* case (even though the Commonwealth conceded at oral argument that such a case could be found). But the Third Circuit made the alternative ruling that a *prima facie* showing was not necessary. This Court should not grant *certiorari* to review the correctness of the Third Circuit's *dicta*.

B. Applying *De Novo* Review, the Third Circuit Correctly Found that Respondent Established a Violation of Batson.

Jury selection in this case took place just two weeks after this Court decided Batson. App. 25 n.7. During jury selection, Respondent, "an African-American, raised objections, created a record as to the race of the stricken venirepersons, and moved for a mistrial on the ground that a pattern of purposeful discrimination had been established. The prosecutor responded by explaining his reasons for three of the strikes," against African-Americans but failed to give any reasons for eight of his strikes against African-Americans. App. 9.

The Third Circuit carefully reviewed the record Respondent made in state court and found a *prima facie* case under Batson. App. 30-37. The existence of a *prima facie* case is quite clear. Indeed, at the Third Circuit oral argument the **Commonwealth conceded the existence of a *prima facie* case**. See infra.

The Third Circuit cogently summarized relevant parts of the record:

> Holloway first objected to the prosecutor's peremptory strikes on the second day of the voir dire proceedings .... After several additional potential jurors were struck by agreement or for cause, Holloway's counsel formally asserted his objection, stating, "I think the District Attorney has now developed a pattern of striking only black prospective jurors. I think that pattern has now developed, and there are nine jurors selected, and two black jurors out of that particular nine. And I would ask for a mistrial and [to] start all over again." [A]1367-68.
>
> Without indicating whether it thought Holloway established a prima facie case, the trial court invited a response from the prosecutor, asking, "Does the Commonwealth have anything to say at this time?" Id. at 1368. The prosecutor replied, "Sure, Judge. As [defense counsel] has indicated, number one, we have nine seated in the box, two of them [sic] whom are black. One black male and one black female. [Counsel] is incorrect when he tells the Court that I have used my pre-empts exclusively on blacks, that's not true. I've struck a white woman also." Id. ... [T]he trial court ended the matter without expressly ruling on whether the prosecutor had struck African-Americans because of their race. The judge concluded, "[Holloway] also knocked off a potential black juror, but the record will speak for itself." Id. at 1369. At that point in the proceedings, the record was clear that the prosecutor had used seven of eight peremptory strikes against African-Americans.[19]
>
> The prosecutor subsequently exercised four additional peremptory strikes, all against African-Americans. After the first of those strikes, against Starlett Sandoval, Holloway's counsel noted for the record that "the Commonwealth has struck another black juror." Id. at 1376. The prosecutor offered no explanation for the strike, nor did the court request one. The prosecutor later struck Robert Keel, after which defense counsel noted, "Let the record indicate a black male." Id. at 1397. Without prompting from the trial court, the prosecutor elected to explain the strike, stating, "May the record indicate a single, young, unemployed, on welfare, black male." Id. The prosecutor next used a peremptory strike against John Hackley, Sr., and Holloway again noted the venireperson's race. [A]1488. The prosecutor explained, "Let the record further show that it is a black juror, black male juror approximately

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[19]The Commonwealth claims that, at this point in the proceedings, "the trial record reflects only the race of the nine jurors already selected ... and it does not establish the racial composition of the other venirepersons." *Petition* at 4. The Commonwealth is quite wrong. As both the Third Circuit and the District Court found, the voir dire record shows that the prosecutor, at this time, had struck seven African-Americans and one white. App. 28, 105. Moreover, the voir dire record also shows that "the race of prospective jurors acceptable to the Commonwealth but stricken by the defense," Holloway-2 at 1045, was zero African Americans and eight whites; and that "the racial composition of the ... jury selected," id., was two African-Americans and seven whites. App. 105.

the same age as the defendant." Id. Finally, the prosecutor exercised a peremptory strike against Elouise Baldi, and after Holloway made note of her race, the prosecutor explained that she was "a Black female, whose brother-in-law was convicted of narcotics charges. Narcotics would play a central role in the testimony of this case." Id. at 1493-94.

The matter proceeded to trial with a jury of nine white jurors and three black jurors, with two white alternate jurors.

App. 27-29 (footnotes omitted).

Thus, the record shows, inter alia: the prosecutor used **eleven** of his **twelve** peremptory strikes against African-Americans; the trial court gave the prosecutor am opportunity to provide reasons for striking these eleven African-Americans; the prosecutor gave **no reason at all** for eight of his strikes against African-Americans; he gave the above-quoted reasons for striking three African-Americans (Mr. Keel, Mr. Hackley, Ms. Baldi).

Based on this, and other relevant record facts, the Third Circuit found a *prima facie* case, App 7, 30-37, and the Commonwealth conceded that a *prima facie* case exists.

The Third Circuit first considered the prosecutor's racially disparate "pattern" of strikes:

> The most striking factor in this case is the prosecutor's pattern of strikes. Holloway moved for a mistrial after the prosecutor had used seven of eight peremptory strikes against African-Americans; the Commonwealth ultimately used eleven of twelve strikes in that manner. As the Court explained in Batson, "a 'pattern' of strikes against black jurors in the particular venire might give rise to an inference of discrimination." 476 U.S. at 97. The pattern here was certainly strong enough to suggest an intention of keeping blacks off the jury.

App. 30.[20]

At the Third Circuit oral argument, the Commonwealth's counsel, Mr. Dolgenos (who also represents the Commonwealth in this Court), **conceded that the racial disparity in the**

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[20]The Third Circuit cited Harrison v. Ryan, 909 F.2d 84 (3d Cir. 1990), which found a *prima facie* case where a Philadelphia prosecutor used six of eight peremptory strikes against African-Americans. App. 30-31. Many similar cases can be cited. Given the Commonwealth's concession that a *prima facie* case exists, we do not belabor this.

prosecutor's strikes, standing alone, establishes a *prima facie* case:

> THE COURT: Eleven out of 12. That's a pretty big percentage, isn't it?
>
> MR. DOLGENOS: Yes.
>
> THE COURT: ... [H]ow does 11 of 12 not give you a prima facie case? Forget all this business about Neeley and Hackley and one person's a young black male, same age as the defendant but you've got white males same age as the defendant sitting on the jury. How does 11 of 12 possibly not equal prima facie case?
>
> MR. DOLGENOS: Well, I agree with Your Honor, the court could easily have found a prima facie case .... **I'm not defending the prima facie case question**.
>
> * * *
>
> THE COURT: **Eleven of 12 equals a prima facie case**.
>
> MR. DOLGENOS: **Right** ....

Holloway v. Horn, Nos. 01-9009 & 01-9010, transcript of oral arg. at 48, 52 (3d Cir. Oct. 27, 2003).

Moreover, as the Third Circuit found, there are also "other relevant circumstances" that "raise an inference" of discrimination, and Respondent "is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate." App. 31 (quoting Batson, 476 U.S. at 96). For example, the prosecutor did not give any reasons for eight of his strikes against African-Americans when the trial court gave him the opportunity to do so. Instead:

> In responding to Holloway's motion for a mistrial, the prosecutor ... explained that he had not used his "pre-empts exclusively on blacks" because he had "struck a white woman also." [A]1368. This explanation, however, did nothing to dispel Holloway's suggestion that the prosecutor harbored a discriminatory intent in striking the seven prospective black jurors. A prosecutor cannot undermine a pattern of strikes that appears racially motivated by merely pointing to a lone juror of a different race whom he also found objectionable. A prosecutor also cannot "rebut the defendant's case merely by denying that he had a discriminatory motive or affirming his good faith in making individual selections." Batson, 476 U.S. at 98 ....

App. 31.[21] The nature of the prosecution's case also supports the *prima facie* showing, because it depended heavily on the jury's evaluation of the relative credibility of white police officers, who testified that Respondent confessed to them, versus this African-American defendant, who testified that he did not confess. App. 31-32; see also App. 7-10 (discussing trial evidence); Counterstatement of the Case, supra (same).[22]

Based on these considerations, the Third Circuit had "little difficulty in concluding that Holloway met his burden under the first step of the Batson analysis," i.e., Respondent established a *prima facie* case. App. 30. Indeed, as stated above, the **Commonwealth conceded that a *prima facie* case exists** and told the Third Circuit it is "not defending the prima facie case question." Transcript of Oral Argument at 48, 52.[23]

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[21]See also Riley v. Taylor, 277 F.3d 261, 283 (3d Cir. 2001) (en banc) ("Where relevant information ... is in the possession of one party and not provided, then an adverse inference may be drawn that such information would be harmful to the party who fails to provide it").

[22]A jury selection training videotape prepared by this prosecutor's office near the time of this trial, see note 23, infra, urges prosecutors to strike African-Americans on the assumption that they are less likely to trust the police. See A749-50.

[23]Respondent notes that there are additional circumstances apparent from the trial record, but not relied on by the Third Circuit, that further support the *prima facie* case. For example, the prosecutor's high strike rate was against people of the same race as Respondent, making this "one of the easier cases to establish both a *prima facie* case and a conclusive showing that wrongful discrimination has occurred," Powers v. Ohio, 499 U.S. 400, 417 (1991), and jury selection occurred just two weeks after Batson was decided, at a time when prosecutorial discrimination in jury selection was still "widespread" and "common," Batson at 101 (White, J, concurring); id. at 103 (Marshall, J, concurring).

Moreover, additional information, further supporting the Batson claim, emerged during post-conviction proceedings, but was not considered by the Third Circuit. App. 32 n.11. The District Court ordered the Commonwealth to produce (in discovery) the prosecutor's personal, handwritten notes from jury selection. These notes show that the prosecutor recorded the race of every potential juror and that he struck an African-American woman on the race-based assumption that a "young black female" would "relate to" an African-American defendant. The prosecutor's personal notes thus confirm that race played an important role in his jury selection decisions. Respondent also introduced a jury selection training videotape that was prepared by this prosecutor's office (the Philadelphia District Attorney) near the time of this trial and released to the public in 1997. The

Once a *prima facie* case is established, the prosecutor must give race-neutral "explanation[s] for striking the black venirepersons from the venire panel." App. 34; accord App. 26, citing Miller-El, 537 U.S. at 328-29; Batson 476 U.S. at 98. As stated above, when Respondent raised the Batson claim during jury selection, the prosecutor "elected to make a record of his reasons for [just] three" of his strikes against African-Americans, and did not offer "any explanation at all for eight of his eleven strikes" against African-Americans. App. 34.[24]

Given the existence of a *prima facie* case and prosecutor's failure to provide any reasons for eight of his strikes against African-Americans, the Third Circuit could have granted Batson relief without any further analysis, as the Commonwealth admits. See *Petition* at 16 (under Batson, "an unrebutted prima facie case entitles the objector to relief"); Batson, 476 U.S. at 100 (same).

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training videotape urges office prosecutors to use racially discriminatory jury selection practices, urges them to keep track of potential jurors' races (as this prosecutor did) so they will know how many blacks and whites remain available for strikes or selection, and threatens them with being fired if they do not use such discriminatory jury selection practices. Respondent also introduced a study of jury selection practices in this prosecutor's office which documents that office's racial discrimination in jury selection, and shows that the office's jury selection practices conform to the racially-discriminatory pattern urged by the above-described training videotape; affidavits from experienced defense attorneys stating that the office's prosecutors have routinely discriminated against African-Americans in jury selection; and a statement by a Philadelphia trial judge, later a Pennsylvania Supreme Court Justice, who described her experience "as one of the most active trial judges on the bench in trying jury trials" that "the practice" of this prosecutor's office was to strike African-Americans. This information shows that this prosecutor's office, at the time of this trial, was a place where a prosecutor who was "of a mind to discriminate," Batson, 476 U.S. at 96-97, was free and even encouraged to do so. It, at least, suggests a "culture of discrimination" in the office, and supports the Batson claim. Miller-El v. Cockrell, 537 U.S. 322 334-35 (2003) (similar evidence supports Batson claim).

[24]The "parties agree that the prosecutor is psychiatrically disabled and has been for some time, and thus would be unable to testify meaningfully at a hearing" or now give any reasons for his strikes. App. 36-37; see also App. 138 (stipulation that prosecutor is psychiatrically disabled, incapable of testifying, and claims no recollection of case). The Third Circuit found that it "cannot fault" Respondent for the prosecutor's unavailability, since Respondent "has pursued the Batson argument at every stage of this case since the time of trial in 1986." App. 37. This is particularly appropriate because the prosecutor was given a contemporaneous opportunity (during jury selection) to provide reasons, and declined to do so for eight strikes.

Moreover, the reasons the prosecutor gave for the three persons for whom he did give reasons (Mr. Keel; Mr. Hackley; Ms. Baldi), were not facially race-neutral; instead, they were facially race-based – the prosecutor included the potential juror's race as part of his reason for the strike. A29 ("black male"; "black juror, black male juror"; "black female"). Based on the lack of race-neutrality in the three explanations given, the Third Circuit, again, could have granted Batson relief without further ado. Purkett v. Elem, 514 U.S. 765, 767-68 (1995).

The Third Circuit, however, did not grant relief on either of these two grounds on which it could have granted relief. Instead, the Third Circuit gave the Commonwealth the benefit of the doubt as to the possible existence of race-neutral reasons (which the prosecutor never gave). The Third Circuit stated: "Although we are troubled by the lack of race-neutrality in each of the prosecutor's explanations, and perhaps more troubled by the lack of any explanation at all for eight of his eleven strikes, the explanation given as to venireperson John Hackley, Sr., was plainly insupportable under Batson and warrants relief." App. 34.

The Third Circuit first noted that "the question of whether a prima facie case has been established becomes moot, and thus need not even be addressed, when the prosecutor provides explanations for the strikes." App. 33, citing Third Circuit precedent and Hernandez v. New York, 500 U.S. 352, 359 (1991) (plurality opinion). Since the prosecutor provided his purported reason for striking Mr. Hackley, the Third Circuit could address Batson's steps two and three regarding Mr. Hackley without even deciding the *prima facie* case question. App. 33-34.

The Third Circuit then reviewed the reason the prosecutor gave for striking Mr. Hackley: "The prosecutor explained the Hackley strike on the ground that Hackley 'is a black juror, black male juror approximately the same age as the defendant.' In other words, the prosecutor cited Hackley's race, age, and gender as the reasons for the strike." App. 34. Again, the Third Circuit could have stopped right there and granted relief, since "the prosecutor cited Hackley's race ... as

[one of] the reasons for the strike," and "[r]ace, obviously, was impermissible." App. 34. Again, the Third Circuit gave the Commonwealth the benefit of the doubt – the court "assume[d]" that the prosecutor's reason was facially race-neutral and that he "referred to Hackley's race merely as concession that Hackley was black so that his race would be clear as a matter of record." App. 34.

After making these multiple assumptions in the Commonwealth's favor, the Third Circuit decided Batson's step three, which required the court to decide if the prosecutor's stated reason (other than race) for striking Mr. Hackley was "pretextual." App. 34-35. In making this step three decision, the Third Circuit examined "the record as a whole," App. 35, as required by this Court's precedent. Miller-El, 537 U.S. at 340. In particular, the Third Circuit noted that a "comparison between a stricken black juror and a sitting white juror is relevant to determining whether the prosecution's asserted justification for striking the black juror is pretextual." App. 34-35 (quoting Third Circuit authority); accord Miller-El, 537 U.S. at 343-45.

The Third Circuit then evaluated the prosecutor's claim that he struck Mr. Hackley because he was "a black juror, black male juror approximately the same age as the defendant," App. 34, in light of the fact that "the prosecutor accepted three white jurors approximately the same age as Holloway, two of whom were males" and "chose not to exercise a peremptory strike against four other white jurors (one male) of approximately the same age who ultimately did not serve on the jury," App. 35. The Third Circuit found that the prosecutor's acceptance of several "white jurors who possessed the same characteristic [as Mr. Hackley] indicates that [the prosecutor's] explanation [for striking Mr. Hackley] was pretextual." App. 35.

The Commonwealth asked the Third Circuit to speculate that the prosecutor had reasons for striking Mr. Hackley different from the reason the prosecutor actually gave for that strike. App. 35. The Third Circuit properly rejected "the Commonwealth's attempt to recast the prosecutor's stated reasons." App. 36. However, the Third Circuit went on to again give the Commonwealth the benefit

of the doubt, and assumed that it should look for reasons other than those the prosecutor actually gave. Even then, Batson relief was required:

> We find nothing in the prosecutor's explanation of the Hackley strike, or in the record as a whole, to indicate that he harbored anything but a discriminatory intent to remove Hackley because of his race.
>
> * * *
>
> On this record, we could not impute a proper motive to the prosecutor's action even if it were proper to hypothesize potential reasons for the strike beyond those given. Relief, therefore, must be granted.

App. 35-36.

The Commonwealth has nothing to complain about here. The Third Circuit found a *prima facie* case, and the Commonwealth conceded that this finding is appropriate. Given the existence of a *prima facie* case, the Third Circuit could have granted Batson relief based on the prosecutor's failure to give any reasons for eight of his strikes against African-Americans. Instead, the Third Circuit made numerous assumptions in the Commonwealth's favor – e.g., assuming that facially race-based reasons are actually race-neutral; assuming that a reviewing court should ignore the prosecutor's stated reasons and speculate that he had reasons other than those he gave. Even with all of those assumptions in the Commonwealth's favor, relief "must be granted" under Batson. The Commonwealth discriminated on the basis of race when it selected Respondent's jury.

C. The Commonwealth Has Distorted the Third Circuit's Actual Discussion of the State Court Ruling; the Actual Discussion is Unobjectionable.

In its attempt to persuade this Court to grant *certiorari*, the Commonwealth has distorted the Third Circuit's opinion into something that is far different from, and in pertinent respects the opposite of what the Circuit actually wrote. Even if the Circuit's *dicta* about the state court ruling were an appropriate issue for *certiorari* review (they are not), the Circuit's actual discussion – as contrasted to the Commonwealth's distortion of that discussion – is correct and unobjectionable.

As the Third Circuit pointed out, in Holloway-2 the Pennsylvania Supreme Court applied a rigid rule requiring that, in every case involving a Batson challenge, the defendant must identify the race of every venireperson stricken by the Commonwealth, the race of venirepersons accepted by the Commonwealth but stricken by the defense, and the racial composition of the final jury, before the court will even consider whether the defendant has established a *prima facie* case. App. 37, citing Holloway-2, 739 A.2d at 1045. The Third Circuit noted this Court's contrasting holding, in Batson itself, that a *prima facie* case may be based on the facts that the prosecutor has used peremptory challenges to remove minority venire members; that peremptory challenges permit those to discriminate who are of a mind to do so; "and any other relevant circumstances [that] raise an inference" that the prosecutor intended to discriminate on the basis of race. App. 40-41, quoting Batson, 476 U.S. at 96-97; see also Miller-El, 537 U.S. at 342-47 (comparative analysis of stricken and non-stricken jurors, disparate questioning of minority jurors, and historical evidence of racial discrimination supported inference of discrimination). Given Batson's "fluid" standard for assessing a *prima facie* case, App. 41, the Third Circuit found that the state court's rigid rule was inconsistent with Batson. App. 41-44.

The Commonwealth turns this analysis on its head. According to the Commonwealth, the Third Circuit "declared that certain kinds of evidence are irrelevant to Batson claims." *Petition* at 18. The Commonwealth says this – without any citations – over and over again. Id. at 7 ("The Third Circuit has taken an extremely narrow view of Batson relevance"); id. (Third Circuit's "cramped view of ... proper evidence"); id. at 9 ("extremely narrow view of Batson relevance"); id. at 19 (under Third Circuit decision, courts would act unlawfully "if they even *consider* the race of jurors accepted by the lawyer accused of discrimination.") (emphasis original).

This often repeated assertion, however, is simply false. The rule applied by the Third Circuit – directly following Batson itself – is one that considers all "relevant circumstances [that] raise an

inference ... of purposeful discrimination," Batson, 476 U.S. at 96-97, including both evidence as to the pattern of strikes, and other relevant evidence. As the Third Circuit pointed out, it was the state court that excluded other relevant evidence by requiring a detailed showing of all veniremembers' races in every case:

> [A] defendant's Batson objection need not always be based on a "pattern" of strikes; it can be based, for example, on a single strike accompanied by a showing that the prosecutor's statements and questions to the juror (or to prior jurors) support an inference of discrimination. Requiring a defendant in that circumstance to identify "the race of all the venirepersons removed by the prosecution" is not necessary to support a prima facie case ....

App. 42.

The Commonwealth attempts to distort the Third Circuit's actual statement – that detailed racial data is not necessary in every case – into a statement that such data is irrelevant by taking a single passage out of context. Near the end of its discussion, the Third Circuit made the following remarks:

> [E]vidence of "the race of jurors acceptable to the Commonwealth who were stricken by the defense," finds no place in the prima facie case, as defense strikes are irrelevant to the determination of whether the prosecutor has engaged in discrimination.

App. 43, quoting Commonwealth v. Simmons, 662 A.2d 621, 631 (Pa. 1995).

The only racial data that the Third Circuit actually said were irrelevant were the races of those jurors stricken by the defense. The Commonwealth, however, cites this discussion as showing that the Third Circuit "held that the race of jurors accepted by the lawyer accused of discrimination, and seated on the jury or struck by the other side, is *irrelevant*." *Petition* at 18 (emphasis original), citing App. 43. This is false – what the Third Circuit said (not held) is that the race of jurors stricken by the defense is irrelevant to whether the prosecutor discriminated. That statement is clearly correct; it is surely not a worthy subject for *certiorari* review.

Ignoring the Third Circuit's actual application of *de novo* review, the Commonwealth then

asserts that the Pennsylvania Supreme Court's decision was reasonable, and that the "only question here is whether the state court's rejection of the Batson claim" could survive review under the AEDPA. *Petition* at 13. The Commonwealth, however, has not attempted to show that the Third Circuit's application of *de novo* review was wrong, or asked this Court to review that question.[25]

The Commonwealth also engages in a hypothetical discussion of ways in which prosecutors could be "trapped" into findings of discrimination, in cases where the Batson claim is raised post-trial, and the prosecutor had no adequate opportunity to rebut the *prima facie* case. *Petition* at 15-16. That discussion, however, is irrelevant to this case. Here, the record as to the race of the jurors stricken by the prosecutor was made during voir dire. See App. 27-29, 105; note 19, supra. Here, the trial court asked the prosecutor "Does the Commonwealth have anything to say?" (providing the prosecutor an opportunity to rebut any inference of discriminatory intent) after the defense objected to the prosecutor's pattern of strikes. App. 28. Here, the Commonwealth conceded at oral argument that a *prima facie* case was established. Here, the prosecutor volunteered reasons for three of his strikes, and the Third Circuit found the reason proffered as to Mr. Hackley to constitute a pretext for discrimination. App. 34-36. Here, the Third Circuit considered and rejected the speculative reasons for that strike suggested years later by the Commonwealth. Id. The purely hypothetical potential effects of *dicta* expressed by a lower court do not constitute grounds for *certiorari* review.

Finally, the Commonwealth complains that the Third Circuit's review of the Hackley strike

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[25]The Commonwealth attempts to raise another issue not fairly included in the questions presented, arguing that the rule applied by the state court would constitute an adequate and independent procedural default. *Petition* at 13-14 n.6. Given that the trial in this case took place two weeks after Batson, a rule concerning the record required for a Batson challenge that was not in existence then could not possibly have been adequate and independent. See Ford v. Georgia, 498 U.S. 411 (1991) (rule concerning method of making Batson objection that was developed after trial could not be retroactively applied to defendant; fact that rule was reasonable was irrelevant). In any event, the Commonwealth cannot obtain *certiorari* review of issues not fairly included in the questions presented, but merely dropped into footnotes. Supreme Court Rule 14.1(a).

was improper, because the Third Circuit initially declined to consider reasons not offered by the prosecutor at trial that the Commonwealth thinks it can glean from aspects of the record now. *Petition* at 20-21 & n.8, citing the trial record and the prosecutor's notes.[26] Consistent with Third Circuit precedent, the Third Circuit held that "where a prosecutor makes his explanation for a strike a matter of record, our review is focused solely upon the reasons given." App. 35-36, citing Riley v. Taylor, 277 F.3d at 282. The Third Circuit also considered and rejected, however, the Commonwealth's contention that the trial record disclosed non-discriminatory reasons for the strike that were not articulated by the trial prosecutor. App. 36.

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[26]The Commonwealth is not in a position to complain about the fact that the Third Circuit declined to consider the prosecutor's handwritten notes. Those notes fill in all the details of juror race about the absence of which the Commonwealth elsewhere complains so vigorously, making it even more clear that the pattern of strikes raises an inference of discrimination. App. 32 n.11. Moreover, the notes indicate that the prosecutor struck an African-American juror because she was a "young black female," about whom the prosecutor made the stereotypical assumption that she would "relate to" Respondent. The prosecutor's notes were obviously in the Commonwealth's possession throughout the proceedings. They prove discrimination, not the reverse. The Commonwealth's attempt to rely on them now betrays its desperation.

CONCLUSION

For all of the reasons stated above, this Court should not grant *certiorari*. The Third Circuit's review of Respondent's Batson claim is thorough, careful and correct. The Commonwealth asks this Court to find fault with a few of the many issues addressed by the Third Circuit. As shown above, however, those rulings were not crucial to the judgment of the Third Circuit. Moreover, the Commonwealth has utterly failed to show any error committed by the Third Circuit, much less any important question of federal law that this Court should resolve.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, MATTHEW C. LAWRY, certify that on this 27th day of September, 2004, I have caused the foregoing brief in opposition to be served by FIRST CLASS MAIL on the following person:

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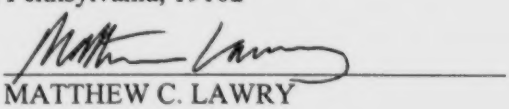

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